

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**JUN 05 2006**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON ED SALEM,

Defendant - Appellant.

No. 05-50203

D.C. No. CR-04-01525-SVW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted October 17, 2005  
Pasadena, California

Before: HUG, PREGERSON, and CLIFTON, Circuit Judges.

Jason Ed Salem appeals the district court's order revoking his supervised release and reimposing a twenty-four month prison sentence. The district court found that Salem violated the conditions of his supervised release by possessing burglary tools in violation of Cal. Penal Code § 466, methamphetamine in violation

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

of Cal. Health & Safety Code § 11377(a), and a hypodermic needle and syringe in violation of Cal. Bus. & Prof. Code § 4140.

As a preliminary matter, 18 U.S.C. § 3583, the statute authorizing the revocation of supervised release, remains constitutional after *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224-25 (9th Cir. 2006). Thus, Salem's *Booker/Apprendi* challenge to the statute fails.

The district court clearly erred in finding that Salem possessed burglary tools in violation of Cal. Penal Code § 466, because Salem did not have these tools in his personal possession, as the statute requires. This error is immaterial, however, because the driving force behind Salem's new sentence was the district court's finding that he possessed methamphetamine, a hypodermic needle, and a syringe in violation of Cal. Health & Safety Code § 11377(a) and Cal. Bus. & Prof. Code § 4140.

The district court did not clearly err in finding that Salem constructively possessed the drug contraband. When asked by the officer whether the car was his, he responded by saying that he had permission to use it, and he had the keys to the car in his pocket. The theory offered by the dissent that Salem might simply have been retrieving clothes from the trunk for the car's owner is no more than a theory,

since Salem presented no affirmative evidence in support of that or any other innocent explanation. It is an unlikely theory, since had it been the case, Salem would probably have responded to the question whether the car was his by saying, “No, but the owner asked me to get the clothes out of the trunk,” rather than, “No, but I have permission to use it,” which according to the evidence is what Salem actually said. Even Salem’s counsel acknowledged that Salem had permission to “borrow the car,” which plainly implies the ability to drive it. When the officer searched the car and flipped down the visor above the driver’s seat, the contraband fell out. Anyone who drove the car might flip the visor down, so it also seems unlikely that someone other than Salem hid the contraband at that location, then gave Salem permission to use the car. Based on this evidence, the district court’s finding that Salem exercised dominion and control over the contraband was not clearly erroneous. *See People v. Newman*, 5 Cal.3d 48, 52 (1971), *overruled on other grounds by People v. Daniels*, 14 Cal.3d 857 (1975), (holding that dominion and control of contraband may be “imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to . . . the joint dominion and control of the accused and another”).

Nor did the district court clearly err in inferring from the circumstances that Salem had knowledge of the presence and nature of the contraband. *See People v.*

*Williams*, 485 P.2d 1146, 1148 (Cal. 1971). The contraband was located within areas of the car likely to have been accessed by Salem as a user of the car. Salem fled from an investigating police officer. One could “reasonably infer that his flight reflected consciousness of guilt.” *See People v. Hutchinson*, 71 Cal.2d 342, 346 (1969). Under a deferential standard of review, we cannot conclude that the district court clearly erred in finding, by a preponderance of the evidence, that Salem possessed the drug contraband. *See, e.g., United States v. Lomayaoma*, 86 F.3d 142, 146-47 (9th Cir. 1996) (rejecting a sufficiency of the evidence challenge to the district court’s inference that a supervised releasee violated a criminal statute with the requisite mens rea, even absent affirmative evidence).

**AFFIRMED.**